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FEDERAL ELECTION COMMISSION
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FIRST GENERAL COUNSEL'S REPORT

MUR: 6173
DATE COMPLAINT FILED: 02/09/2009
DATE OF NOTIFICATION: 02/12/2009
LAST RESPONSE RECEIVED: 04/09/2009
DATE ACTIVATED: 06/10/2009
EXPIRATION OF SOL: 10/30/2013

COMPLAINANT:

Jon O'Brien
Catholics for Choice

RESPONDENT:

Population Research Institute, Inc.

RELEVANT STATUTES:

2 U.S.C. § 431(8)
2 U.S.C. § 431(9)
2 U.S.C. § 441b
11 C.F.R. § 100.22
11 C.F.R. § 100.52
11 C.F.R. § 100.73
11 C.F.R. § 100.111(a)
11 C.F.R. § 100.132

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

Internal Revenue Service

I. INTRODUCTION

This matter arises from a complaint alleging that the Population Research Institute, Inc. ("PRI" or "Respondent") violated 2 U.S.C. § 441b by using corporate resources to prepare and distribute an electronic newsletter expressly advocating the election of presidential candidate . John McCain, resulting in an "illegal corporate expenditure." Complaint at 1-2. The Respondent admits sending its *Weekly Briefing* electronic newsletter on October 30, 2008, but asserts that the

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1 costs of the communication were *de minimis* and claims that the newsletter qualifies for the Act's
2 "press exemption." Response at 3-7.¹

3 Although PRI's *Weekly Briefing* newsletter contains express advocacy, it was distributed
4 through email and on PRI's own website, and it appears that PRI spent minimal funds to produce
5 and send the newsletter. See Response at 7. We therefore recommend that the Commission
6 dismiss this matter in an exercise of prosecutorial discretion as outlined in *Heckler v. Chaney*,
7 470 U.S. 821 (1985).

8 **II. FACTUAL AND LEGAL ANALYSIS**

9 **A. Factual Background**

10
11 PRI is a 501(c)(3) nonprofit corporation registered in Virginia. See Response at 1; see
12 also Population Research Institute, Inc., IRS Form 990 (2006), available at
13 <http://www.guidestar.org/FinDocuments/2007/541/819/2007-541819935-0415de52-9.pdf>. PRI
14 states that it is "a research organization dedicated to publishing information to debunk population
15 myths, expose misleading claims and programs, emphasize the value of people, promote
16 profamily attitudes and encourage programs to help the poor" and that it "pursues this mission
17 principally through research and publication." See Response at 4; see also 2006 Form 990,
18 Statement of Exempt Purpose.

¹ The response also argued that emails are not "public communications" under 11 C.F.R. § 100.26 and, as a result, its electronic newsletter cannot constitute an impermissible corporate "expenditure" under the Act. See Response at 3. While emails are exempt from the definition of "public communication," and thus the provisions of the Act incorporating that term (*i.e.*, federal election activity, electioneering communications, coordinated communications, disclaimers, definition of an "agent" of a state or local candidate, allocation rules for spending by separate segregated funds) would not apply, see *Internet Communications*, 71 Fed. Reg. 18,589, 18,591-92, 18,596-97 (Apr. 12, 2006), the Act and Commission regulations do not limit the definitions of "expenditure" or "independent expenditure" to "public communications." See 2 U.S.C. §§ 431(9)(A), 431(17); 11 C.F.R. §§ 100.16, 100.111. Therefore, the fact that the *Weekly Briefing* may not have been a public communication does not affect whether it is an expenditure or contribution under the Act.

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1 On October 30, 2008, PRI emailed and posted on its website an electronic newsletter
2 entitled "PRI Weekly Briefing - Vote as if Lives Depend on It," which is reproduced below.

PRI Weekly Briefing - Vote as if Lives Depend on It

From: pri@pfp.org
Sent: Thu 10/30/08 2:34 PM
To:



Next Tuesday, the voters will arguably determine, by their choice of candidates, the fate of the pro-life cause for a generation. The differences between the candidates on the Life issue could not be more dramatic. We at PRI would like to urge each and every one of you to vote in this election—and to vote pro-life.

Steven Mosher

Vote as if Lives Depend on It - Because They Do

by Colin Mason

On Tuesday, we will participate in a historic election. The stakes are high, and the campaign hard-fought. Already, in states like North Carolina and Florida, early voting has drawn record-smashing crowds. The nation's voters are engaged in this election to a degree rare in American history, and pro-life voters must play their part. It is of paramount importance that voters go to the voting booth on November 4th, and that they bring their pro-life convictions with them. There are stark differences between the two candidates on the life issues. John McCain has a perfect pro-life voting record in his years in the Senate, and has chosen a committed social conservative as his running mate. Barack Obama, for his part, has a record of consistently voting against the unborn. His radical stance in favor of abortion is illustrated by his insistence, at a Planned Parenthood function, that on the "fundamental issue" of choice, he "will not yield and Planned Parenthood will not yield."

If elected, John McCain would:

- Veto the so-called Freedom of Choice Act," which would overturn any and all restrictions on abortion, including parental consent laws, waiting periods, informed consent laws and the like.
- Serve as a check on the Congress, where a pro-abortion majority dominates both the House and the Senate.
- Appoint strict constructionist justices to the Supreme Court, who less likely to distort the meaning of the Constitution to serve their political and ideological ends.
- Issue Executive Orders which protect and defend innocent human life.
- Sign pro-life laws and amendments into law, thus encouraging Congressional pro-lifers to work on

If elected, Barack Obama would:

- Sign into law the so-called Freedom of Choice Act."
- Preside over a government dominated by the party of abortion, putting both the executive and the legislative branches in the hands of a single party
- Appoint justices on the basis of their "empathy," rather than on their adherence to the original intent of the Founders.
- Issue Executive Orders which promote the cause of abortion, and increase its numbers.
- Veto any pro-life laws and amendments that reached his desk.
- Serve with a vice president who shares his determination to promote abortion on demand without

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<p>behalf of such legislation</p> <ul style="list-style-type: none">• Enjoy the support of a staunchly pro-life vice president	<p>restrictions.</p>
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This is, for the pro-life movement, a watershed election. If the pro-life candidate wins, he will be able to protect our gains of past decades, and ensure that the federal judiciary is peopled by judges who will not legislate from the bench. If the pro-abortion candidate wins, not only will all of our gains be undone, abortion-on-demand will be written into national law.

Spread the word. Get involved. And on November 4th vote as if millions of lives depend on it. Because they do.

Vote pro-life.

Colin Mason is Director of Media Production at PRI.

Sign up for the Weekly Briefing Here

Media Contact: Colin Mason
Email: colin@pop.org
(840) 622-6240, ext. 300

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PRI is a 501(c)(3) educational organization. If you would like to make a tax-deductible donation to PRI, please go to our Donations Page. All donations (of any size) are welcomed and appreciated.

The pro-life Population Research Institute is dedicated to ending human rights abuses committed in the name of "family planning," and to ending market-productive social and economic paradigms predicated on the myth of "overpopulation." Find us at www.pop.org

PRI, PO Box 1868, Front Royal, VA 22630 USA Phone: 840-622-6240

Click here if you do not want to receive further emails.

- 1
- 2 See Complaint Attachment 1; see also Response at 2, 6 n.4; Catholics for Choice Press Release,
- 3 *Catholics for Choice Files Complaints with IRS and FEC, available at*
- 4 <http://www.cath4choice.org/news/pr/2008/IRSandFECComplaintsAgainstPRI.asp> (Nov. 20,
- 5 2008). PRI apparently sent this communication to any person who signed up to receive its
- 6 newsletter on its website and did not limit distribution to its restricted class. See Complaint at 2.
- 7 PRI acknowledges disseminating the newsletter, but claims that it was part of its regular
- 8 electronic newsletter, the *Weekly Briefing*, which it has published continuously for over ten years.

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1 See Response at 2, 4-6. In addition, PRI states that it has removed the October 30, 2008, *Weekly*
2 *Briefing* from its website as a precautionary measure. See *id.* at 6, n.4.

3 **B. Legal Analysis**

4 The Act prohibits corporations from making contributions or expenditures from their
5 general treasury funds in connection with any election of any candidate for Federal office.

6 2 U.S.C. § 441b(a). The Act defines "contribution" and "expenditure" to include any gift of
7 money or "anything of value" made for the purpose of influencing any election for Federal office.

8 2 U.S.C. § 431(8)(A)(i), (9)(A)(i). In determining whether a corporation makes an expenditure,
9 the Commission analyzes whether the communication at issue expressly advocates the election or
10 defeat of a clearly identified federal candidate. See 11 C.F.R. § 100.22. Under the

11 Commission's regulations, a communication expressly advocates the election or defeat of a
12 clearly identified candidate when it uses phrases such as "vote for the President," "re-elect your
13 Congressman," or "Smith for Congress," or uses campaign slogans or individual words, "which
14 in context can have no other reasonable meaning than to urge the election or defeat of one or
15 more clearly identified candidate(s)...." 11 C.F.R. § 100.22(a). Further, section 100.22(a)
16 specifically states that a "communication that uses phrases such as 'vote Pro-Life'...

17 accompanied by a listing of clearly identified candidates described as 'Pro-Life' ..." is express
18 advocacy.

19 PRI's October 30, 2008, *Weekly Briefing* falls squarely within section 100.22(a).

20 Moreover, PRI's exhortation to "vote pro-life" while also identifying the candidate with the
21 "perfect pro-life voting record" constitutes express advocacy as identified by the Supreme Court
22 in *FEC v. Massachusetts Citizens for Life*. 479 U.S. 238 (1986) ("*MCFL*"). In *MCFL*, a
23 nonprofit organization prepared and distributed a "Special Edition" before the September 1978

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1 primary elections. The front page of the publication was headlined "EVERYTHING YOU
2 NEED TO KNOW TO VOTE PRO-LIFE," and admonished readers that "[n]o pro-life candidate
3 can win in November without your vote in September." "VOTE PRO-LIFE" was printed in large
4 bold-faced letters on the back page, and a coupon was provided to be clipped and taken to the
5 polls to remind voters of the name of the "pro-life" candidates. *See id.* at 243. Additionally, the
6 "Special Edition" flyer identified candidates for each state and federal office in Massachusetts,
7 identified their positions on three pro-life issues, and placed an asterisk and a photograph next to
8 candidates who maintained a "100% pro-life voting record." *See id.* at 243-44. The Supreme
9 Court concluded that

10 The [MCFL Special Edition Newsletter] cannot be regarded as a
11 mere discussion of public issues that by their nature raise the
12 names of certain politicians. Rather, it provides in effect an
13 explicit directive: vote for these (named) candidates. The fact that
14 this message is marginally less direct than "Vote for Smith" does
15 not change its essential nature. The Edition goes beyond issue
16 discussion to express electoral advocacy.

17 *Id.* at 249 (emphasis added); *see also FEC v. Christian Coalition*, 52 F.Supp. 2d 45, 58-59, 65
18 (D.D.C. 1999) (concluding that mailer including a cover letter announcing that "The Primary
19 Elections are here!," describing a candidate as a "Christian Coalition 100 percenter," and
20 enclosing a voter ID card and a Congressional Scorecard "[t]o help you prepare for your trip to
21 the voting booth" was express advocacy). Like the communication in *MCFL*, the PRI newsletter
22 contains express advocacy because it clearly identifies a specific candidate, John McCain, as a
23 "pro-life" candidate and then tells voters to "vote pro-life." While marginally less direct than
24 "vote for John McCain," it does not change the essential nature of the message.

25 Commission regulations also define express advocacy as a communication that, when
26 taken as a whole or with limited reference to external events, "could only be interpreted by a

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1 reasonable person as containing advocacy of the election or defeat of one or more clearly
2 identified candidate(s) because" it contains an "electoral portion" that is "unmistakable,
3 unambiguous, and suggestive of only one meaning" and "reasonable minds could not differ as to
4 whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or
5 encourages some other kind of action." 11 C.F.R. § 100.22(b). *Weekly Briefing* contains express
6 advocacy under 11 C.F.R. § 100.22(b) because the electoral portion, exhorting voters to "vote
7 pro-life" and identifying John McCain as the pro-life candidate, is unmistakable, unambiguous,
8 and suggestive of only one meaning, and reasonable minds could not differ as to whether the
9 newsletter encourages actions to elect John McCain.

10 Although PRI's newsletter contains express advocacy, and therefore is a corporate
11 expenditure, the costs of producing this newsletter were *de minimis*. The complaint
12 acknowledges that the cost of the newsletter may be "relatively little," Complaint at 2, and the
13 response estimates that the value of the staff time used to produce the newsletter was no more
14 than \$35.00. See Response at 7. As the Commission has noted in its Explanation and
15 Justification relating to Internet Communications, "there is virtually no cost associated with
16 sending e-mail communications, even thousands of e-mails to thousands of recipients. . . ."
17 See 71 Fed. Reg. at 18,596 (explaining why email is not a form of "general public political
18 advertising"). Because of the *de minimis* nature of the activity, we recommend that the
19 Commission exercise its prosecutorial discretion and dismiss this matter. See *Heckler v. Chaney*,
20 470 U.S. 821 (1985).

21 PRI asserts that its newsletter qualifies for the press exemption, which exempts from the
22 Act's definition of contribution or expenditure any cost "incurred in covering or carrying a news
23 story, commentary, or editorial by any broadcasting station (including a cable television operator,

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1 programmer, or producer), ... unless the facility is owned or controlled by any political party,
2 political committee, or candidate." 2 U.S.C. § 431(8)(A)(i), (9)(A)(i), and (9)(B)(i);
3 11 C.F.R. §§ 100.52, 100.73, 100.111(a), and 100.132. Because the *de minimis* costs of the
4 communication warrant dismissal, we do not analyze whether the press exemption applies. See
5 MUR 5491 (Jerry Falwell Ministries, Inc.), Statement of Reasons of Chairman Thomas, Vice
6 Chairman Toner, and Commissioners Mason, McDonald, Thomas and Weintraub (Commission
7 dismissed matter involving express advocacy distributed by email and on the corporation's
8 homepage based on the *de minimis* costs of the communication and declined to reach the
9 Respondent's press exemption and QNC status claims).

10 **III. RECOMMENDATIONS**

- 11 1. Dismiss this matter in an exercise of prosecutorial discretion as outlined in
12 *Heckler v. Chaney*, 470 U.S. 821 (1985).
13
14 2. Approve the attached Factual and Legal Analysis.
15
16 3. Approve the appropriate letters.
17

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4. Close the file.

Thomasenia P. Duncan
General Counsel

09/08/09
Date

BY: Stephen Gura
Stephen Gura
Deputy Associate General Counsel for
Enforcement

Julie K. McConnell
Julie K. McConnell
Assistant General Counsel

William A. Powers
William A. Powers
Attorney

| PRI Weekly Briefing (Oct. 30, 2008)

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PRI Weekly Briefing - Vote as if Lives Depend on It

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Sent: Thu 10/30/08 2:54 PM

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ATTACHMENT 2

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Colin Mason is Director of Media Production at PRI.

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 (540) 622-6240, ext. 208

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PRI, PO Box 1559, Front Royal, VA 22630 USA Phone: 540-622-6240

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ATTACHMENT 2
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